

Supreme Court, U. S.
FILED

JUN 20 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-1818

RICHARD HAMILTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

The petitioner, Richard Hamilton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered April 13, 1977.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit entered its opinion on April 13, 1977. A copy of the opinion affirming the judgment of the United States District Court, District of Kansas, overruling Appellants motion to vacate conviction is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is involved under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

The conviction of Appellant cannot stand and must be vacated by reason of same being obtained in violation of the requirements of Rule 11 of the Federal Rules of Criminal Procedure, in that Appellant was not fully advised of the consequences of his plea.

II

The Court erred in its application in this decision of the test established in Davis vs. United States, 417 U.S. 333, in reviewing the ruling of the lower Court overruling Appellants motion to vacate under 28 U.S.C. Section 2255.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital or otherwise infamous crime,.....; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;
....."

STATEMENT OF THE CASE

Petitioner seeks review of the opinion of the United States Court of Appeals for the Tenth Circuit rendered herein on April 13, 1977. The Circuit Court affirmed the judgment of the U. S. District Court for the District of Kansas denying petitioner relief under his motion filed pursuant to 28 U.S.C. Section 2255 for vacation of his conviction. The basis for the motion of petitioner to vacate his conviction was that he was not fully advised of the consequences of his plea upon acceptance of his plea of guilty in violation of the requirements of Rule 11 of the Federal Rules of Criminal Procedure. Petitioner seeks review of the Circuit Court's opinion affirming the judgment of the U. S. District Court for the District of Kansas.

STATEMENT OF FACTS

On the date of October 18, 1972, the trial Court accepted a plea of guilty on behalf of Appellant to the offense of conspiracy as defined by the provisions of 21 U.S.C. Sec. 960 and 963. Thereafter on the date of December 11, 1972, the Appellant was sentenced to a term of imprisonment of three (3) years, to be eligible

for parole at such time as the U.S. Board of Parole may determine pursuant to 18 U.S.C. Sec. 4208 (a) (2). The Appellant was not advised at either the hearing on the plea of guilty or the hearing on sentencing of any requirement for imposition of a mandatory special parole. On the date of January 10, 1973, the Appellant was committed to the custody of the United States Attorney General and commenced the service of his confinement at the Federal Penitentiary, El Reno, Oklahoma.

Appellant was 22 years of age at the time Appellant's plea of guilty was accepted by the trial Court.

On the date of April 5, 1973, the trial Court, on its own motion, based upon a written communication from the Bureau of Prisons, amended its previous judgment and commitment by issuing its Order adding to the original sentence of three (3) years a special parole term of three (3) years under the purported authority of the provisions of 21 U.S.C. Sec. 841.

By Order dated September 20, 1973, upon motion of Appellant, the Amended Judgment and Commitment was amended and corrected to reflect a reduction of the special parole term of three (3) years to a term of two (2) years.

The Appellant was not returned to the Court for either the first or second amendment to the initial judgment and commitment entered by the trial Court on December 11, 1972.

Appellant filed his motion and Petition to Vacate Conviction and Sentence on January 20, 1976, on the ground that he was not made aware at the time his plea of guilty was accepted by the Court, of any mandate for the imposition of any special parole term, and therefore, he was not made sufficiently aware of the consequences of his plea of guilty to the offense charged. On February 25, 1976, without conducting a hearing or having oral argument, the trial Court entered its Order denying the relief requested by Appellant.

REASONS FOR GRANTING THE WRIT

The record of proceedings in the lower Court reflects that at the time of the acceptance of Appellant's plea of guilty by the trial Court (October 18, 1972) the Appellant was not advised of any requirement of a special parole provision to be added to any term of imprisonment the Court might impose.

Rule 11 of the Federal Rules of Criminal Procedure prescribes the requirement that a plea of guilty cannot be accepted in the absence of the accused being made fully aware of the consequences of his plea.

The December 1, 1975, amendment to Rule 11 essentially codifies the prior case law with respect to the requirement of the Court to inform the accused of the maximum possible penalty provided by law. See Rule 11, Federal Rules of Criminal Procedure, Sec. (c) (1).

The following cases support the proposition that a plea cannot stand if defendant has not been advised of the maximum sentence: Marvel vs United States, 85, S.Ct. 953, 380 U.S. 262, 13 L.Ed. 2d 960 (1965); Workman vs United States, 337 F.2d 226 (1964); Freeman vs United States, 350 F.2d 940 (1965); Harper vs United States, 368 F.2d (1966, C.A. 10th).

In the instant case the Appellant was not advised of the maximum possible sentence prior to his plea of guilty, and accordingly his plea cannot stand. In view of prevailing case law it cannot be said that the arbitrary and unilateral action of the trial Court in imposing the special parole provision subsequent to the plea of guilty and after the Appellant was incarcerated was either proper or legal.

It is the mandatory duty of the trial Court to ascertain that a guilty plea is made voluntarily and with the understanding of the charge. If the Court fails to perform this duty,

the burden falls on the United States in a subsequent attack on the plea by motion to withdraw the plea, or by motion under 28 U.S.C. Sec. 2255 to establish that the plea was in fact made voluntarily and intelligently. See Kennedy v. United States, 249 F.2d 257; See also Wright, Federal Practice and Procedure, sec. 172.

A most recent case in exact point on the issue in the appeal, decided October 31, 1975, is United States v. Yazbeck, 524 F.2d 641 (1975). The Yazbeck case illustrates the supreme importance of the duties and requirements imposed upon the trial court which must be strictly adhered to prior to the acceptance of a guilty plea. At Syl. (1) of that decision the rule is stated as follows:

"To satisfy rule regarding defendant's understanding of consequences of plea of guilty, record must show defendant was personally advised of sentence provided by law and that he acknowledged in some sufficient way his understanding of it, and while this does not mean a judge may never rely on prosecutor or another to state in open court the relevant statutory provisions or to conduct portions of

required inquiry, if information is transmitted by someone other than the judge it is essential that record leave no doubt that defendant heard and understood what was said."

and at Syl. (2) it is stated, with particular emphasis on the complicating effect of a special parole term, the following:

"Full inquiry under rule relating to defendant's understanding of consequences of guilty plea is particularly important when possible sentence has unique complication of a special parole term that must attach to any sentence of imprisonment."

and at Syl. (3) it is further stated as follows:

"Where neither court nor prosecutor questioned defendant as to his understanding of penalty provided by statute relating to the offense of intentional distribution of cocaine, which prescribes a special mandatory parole term of three years following completion of sentence, and record

failed to show any affirmative indication by defendant that he knew he could receive a sentence up to 15 years followed by a special parole term as outlined in statement of prosecutor, there was insufficient compliance with rule and conviction following guilty plea could not stand."

In Yazbeck, as in the instant case the defendant was sentenced to a term less than the maximum sentence. The Court, nevertheless, vacated the conviction for the reason that the record failed to conclusively show that the defendant was advised of the maximum possible sentence. (See footnote (1), Page 643 of opinion.)

The record did show, however, that the prosecutor stated to the Court that the offense charged carried a maximum sentence of fifteen (15) years, and in addition thereto, a special parole term of at least three (3) years. Even in face of such facts being contained in the record, the Court ruled that it is essential that the record leave no doubt that the defendant knew and understood what was said regarding the "consequences of his plea." Citing McCarthy v. United

States, 394 U.S. 459, 89 S.Ct. 1166,
22 L.Ed, 2d, 418 (1969) and Durant v.
United States 410 F.2d 689 (1969), the
Court stated the following:

"To satisfy the rule, the record must show that the defendant was personally advised of the sentence provided by law and that he acknowledged in some sufficient way his understanding of it."

At page 643 of the Yazbeck opinion the Court makes the following statement with reference to the concept of the mandatory special parole term and its relationship to the requirements of Rule 11:

"Full inquiry under Rule 11 is particularly important in conjunction with a possible sentence having the unique complication of a special parole term that must attach to any sentence of imprisonment. Like ineligibility for regular parole (citing Durant, supra.) a mandatory special parole term is a consequence of the plea within the meaning of the Rule."

See United States v. Wolak, 510 F.2d. 164, 166 (1975); Michel v. United

States, 507 F.2d 461 463 (1974); Roberts v. United States, 491 F.2d 1236, 1238 (1974); United States v. Richardson 483 F.2d 516, 518 (1973). See also Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 880-81 (1975).

In Yazbeck, the plea of guilty was vacated for the reason that the record failed to show any affirmative indication by the defendant that he knew that he could receive a prison sentence of up to fifteen years followed by a special parole term of at least three (3) years. The record in the instant case conclusively reveals a factual situation where Appellant was not advised by the Court, or any other source, of the requirement of a special mandatory parole term. The Court conclusively failed to meet the requirements of Rule 11 as prerequisite to its acceptance of the plea of guilty of Appellant. The plea cannot stand and is null and void and of no legal effect.

The United States Court of Appeals for the Tenth Circuit adopted the rationale stated in Davis v. United States, 417 U.S. 333 in affirming the judgment of the lower court denying Appellant's motion to vacate his conviction.

The Davis decision has established

precedent that for collateral relief to be available, something more than a simple violation of a formal requirement of a rule of criminal procedure must be shown. In Hill v. United States 368 U.S. 424, the Court suggested that the proper inquiry is "whether the claimed error . . . was a fundamental defect . . . inherently resulting in a complete miscarriage of justice."

The Davis ruling has now resulted in two circuit decisions, cited in the opinion of this appeal, denying sec. 2255 relief wherein defendant was not advised of a special mandatory parole term prior to the acceptance of his guilty plea.

CONCLUSION

The Davis decision involved a petition for sec. 2255 relief for vacating a conviction because of a post conviction change in the construction of Selective Service Laws. The rationale of that decision has now been used to deny relief where the mandates of Rule 11, and the inherent right of an accused to be fully advised of the consequences of his plea of guilty, have clearly been violated.

It is the contention of this

Appellant, your petitioner, that the Davis decision was not meant to qualify or otherwise modify the Rule 11 requirements promulgated in McCarthy v. United States, supra, and other decisions cited above. Petitioner further contends in support of his petition for this Writ of Certiorari, that the failure to advise an accused fully of the consequences of his plea of guilty is something more than a simple violation of a rule of criminal procedure and that same cannot be passed off as an insignificant and inconsequential error. That same results in a substantial miscarriage of justice and a denial of due process of law.

The Tenth Circuit Court of Appeals has reasoned that since petitioner has served his confinement and has not been discharged of the special mandatory parole, that a "miscarriage of justice" has not resulted and nothing now would be gained by the vacation of petitioner's conviction.

Petitioner submits that even if the test established by the Davis decision is applicable, the test established in that case has been misapplied by the Court in this case, in that the Court of Appeals has based its decision on conditions now existing, i.e. petitioner has served his sentence, and the Court has not based its decision upon the circumstance and conditions existing at the time the plea was accepted

by the lower court. It is these facts and circumstances that should be considered, if the Davis case is to be applied.

Previous decision of this Court, as cited above herein, have already established that under the mandate of Rule 11 a failure to fully advise an accused of the consequences of his plea results in an inherent and substantial miscarriage of justice.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,)

) Appellee,)

v.) No. 76-1313

) RICHARD HAMILTON,)

) Appellant)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF KANSAS
(D.C. No. W-CR-1536)

BREITENSTEIN, Circuit Judge.

Petitioner-appellant Hamilton appeals from an Order denying his "Motion and Petition to Vacate Conviction and Sentence" submitted alternatively under Rule 35, F.R. Crim. P., and 28 U.S.C. Section 2255. We affirm.

On October 18, 1972, in the United States District Court for the District of Kansas, petitioner pleaded guilty to conspiring to import controlled substance in violation of 21 U.S.C. Sec's. 960 and 963. On December 11, he was sentenced to imprisonment for three years with parole eligibility to be determined pursuant to 18 U.S.C. sec. 4208 (a) (2). At the time of plea and sentence he was not told of any mandatory parole term.

The Bureau of Prisons called the attention of the trial Court to the mandatory parole provisions of the narcotic laws. On April 5, 1973, the court on its own motion and without notice to, or presence of, petitioner or his retained counsel, amended the judgment of sentence to impose the mandatory three-year parole provision of 21 U.S.C. sec. 841. Petitioner had pleaded guilty to violations of 21 U.S.C. sec's. 960 and 963.

Petitioner then filed a motion for correction of sentence and pointed out that he had not been prosecuted under sec. 841. In his motion petitioner said that a "Special Parole Term of Two Years pursuant to 21 U.S.C. sec. 960 would be proper." He asked that the judgment and sentence as amended on April 5 be amended to provide for the two-year parole requirement of sec. 960. On September 20, without notice

to, or presence of, petitioner or his counsel, the court again amended the judgment to provide for a two-year special parole as required by sec. 960. The unique parole provisions of the 1970 amendments to the narcotic laws only become material if the defendant violates his parole provisions. See Bachner v. United States, 7 Cir., 517 F.2d 589, 597, and McRae v. United States, 8 Cir., 540 F.2d, 943, 946, n.3.

The acceptance of the guilty plea and the subsequent imposition of sentence, both without advising the petitioner of the mandatory parole requirements, violated Rule 11 (c), F.R. Crim.P.. McCarthy v. United States, 394 U.S. 459, 471-472. The first amendment of the sentence, the addition of the mandatory parole requirement, took place without notice to, to the presence of, either the petitioner or his retained counsel. In Mayfield v. United States, 10 Cir., 504 F.2d 888, in the absence of both defendant and counsel, the district court resentenced the defendant by adding to the original sentence the mandatory parole requirement of sec. 841. We held that the presence of the defendant was required and remanded for resentencing. Ibid at 889.

Petitioner's application for alternative relief either under Rule 35, F.R. Crim.P. or under sec. 2255

was denied by the court without any response by the government and without hearing oral argument. Petitioner has served his term. On September 8, 1976, the United States Parole Commission terminated his special parole term. The government concedes that the release from parole does not moot the case. See *Carafas v. LaVallee*, 391 U.S. 234, 237.

The trial court held, and the government contends, that petitioner's motion for correction of sentence, which asserted that parole could only be ordered under sec. 960, waived any objection he might have had to a violation of Rule 11. Petitioner's motion was for correction of sentence under Rule 35. A motion to correct a sentence does not attack the validity of the underlying conviction. *Brown v. United States*, 5 Cir., 480 F.2d 1036, 1039. The sec. 2255 proceeding before us attacks the validity of the conviction. The presentation of the Rule 35 motion was no waiver of a right to proceed under sec. 2255.

The district court violated Rule 11 in failing to advise petitioner of the mandatory parole term. In *McCarthy v. United States*, 394 U.S. 459, 471, the court said "prejudice inheres in a failure to comply with Rule 11." At least four circuits have held that a guilty plea must be set aside when the trial court has

failed to advise a defendant of the mandatory parole provisions of the natcotic laws. See *United States v. Yazbeck*, 1 Cir., 524 F.2d 641; *Ferguson v. United States*, 2 Cir., 513 F.2d 1011; *United States v. Wolak*, 6 Cir., 491 F.2d 164; and *Roberts v. United States*, 3 Cir., 491 F.2d 1236.

None of the four decisions just cited mentioned the decision in *Davis v. United States*, 417 U.S. 333. In that case the petitioner sought sec. 2255 relief for vacation of his conviction because of a post-conviction change in the construction of the Selective Service Laws. The court stated that not all errors of law could be raised on a sec. 2255 motion. The Court reiterated its holding in *Hill v. United States*, 368 U.S. 424, 429, that for collateral relief to be available something more than a simple violation of a formal requirement of a rule of criminal procedure must be shown. The Court suggested that the proper inquiry under sec. 2255 is, *Ibid.* at 346.

"(W)ether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '(i)t . . . presents(s) exceptional circumstances where the need

for the remedy afforded by the writ of habeas corpus is apparent."

The Davis decision has resulted in two circuits denying sec. 2255 relief when the defendant was not advised of a special mandatory parole term prior to the acceptance of his guilty plea. See Bachner v. United States, 7 Cir., 517 F.2d 589; McRae v. United States, 8 Cir., 540 F.2d 943, and United States v. Ortiz, 8 Cir., 545 F.2d 1122. These cases all stress the lack of a fundamental defect resulting in a complete miscarriage of justice or presenting special circumstances justifying collateral relief. In Bell v. United States, 4 Cir., 521 F.2d 713, cert. denied 424 U.S. 918, sec. 2255 relief was denied in a similar situation without discussion of Davis.

No Tenth Circuit decision considers the general applicability of sec. 2255 and Rule 11 in the light of Davis. The dicta found in United States v. Jones, 10 Cir., 540 F.2d 465, 468-469, has no precedential value. In that case the defendant pleaded not guilty and was convicted by a jury. Rule 11 was not at issue. Mayfield v. United States, 10 Cir., 504 F.2d 888, rejected an amended sentence because neither the defendant nor his counsel was present when the action was taken.

The application to the case at bar of the Davis tests of miscarriage of justice and exceptional circumstance convinces us that the petitioner is not entitled to sec. 2255 relief. Petitioner was represented by competent retained counsel both at arraignment and sentence. The trial court explained the petitioner's rights at length and was assured both by the petitioner and his lawyer that the guilty plea was voluntary. The ultimate sentence was three years and two years parole. The total period did not exceed the term of imprisonment which the Court told petitioner he might receive for his offense. After he knew of the mandatory parole provisions, petitioner did not seek vacation of the guilty plea but rather sought modification of the sentence under Rule 35 to provide for a two-year parole. He did not file the pending sec. 2255 motion until three years later. We are convinced that the petitioner voluntarily pleaded guilty and was not prejudiced by the technical rule violation. On the record before us the failure to advise the petitioner of the mandatory parole term did not inherently result in a miscarriage of justice or present exceptional circumstances justifying collateral relief. The district court properly denied the sec. 2255 motion.

In the alternative, petitioner's

motion was based on Rule 35 relating to correction or modification of sentence. The second amended sentence, which imposed the three-year term plus two years parole did not exceed the statutory penalty and was legal. The time has past when petitioner could seek a reduction of sentence, and, indeed, he has been released from parole.

We recognize the recent decision in United States v. Watson, D.C. Cir., f.2d ___, decided January 5, 1977. That case related to a claimed Rule 11 violation arising from failure to tell a defendant of the mandatory parole requirement of certain narcotic laws. A pro se litigant, later represented by counsel, sought to invoke sec. 2255. The court discussed Davis and referred to the "uncertainties that accompany the resolution of the scope of 2255 in relation to Rule 11 violation." The court remanded the case to the district court for consideration under the standards provided in Rule 32(d). That rule says that to correct manifest injustice the court may permit a defendant to withdraw his plea. Nothing is to be gained by the invocation of Rule 32(d). Davis says that sec. 2255 may be used when a sec. 2255 motion presents a defect which results in a miscarriage of justice. We are convinced that there was no miscarriage of justice in the case at bar.

Affirmed.

AFFIDAVIT OF SERVICE

RUSSELL E. GRANT, being first duly sworn, deposes and states:

That in accordance with Rule 33 (2)(e), Supreme Court Rules, he has forwarded three (3) copies of the following listed documents to E. Edward Johnson, United States Attorney for the District of Kansas, Federal Building, Wichita, Kansas, 67201 and to the Solicitor General, Department of Justice, Washington, D.C., 20530, on this 17th day of June, 1977.

- (1) Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit;
- (2) Affidavit of Service.


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Subscribed and sworn to before
me this 17th day of June, 1977.

Pamela L. Fielden
Notary Public

My commission expires:

May 16, 1978

